

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

TAYLOR & ASSOCIATES, L.P.,
Debtor.

No. 95-33024
Involuntary Chapter 7

M E M O R A N D U M

APPEARANCES:

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Michael Rogers; and Ben F. Rogers*

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

Presently before the court is Dudley W. Taylor's motion seeking (1) damages pursuant to 11 U.S.C. § 303(i)(2) for the petitioning creditors'¹ alleged bad faith filing of the involuntary petition; and (2) to tax the petitioning creditors for all administrative expenses. Also before the court is the petitioning creditors' request that Mr. Taylor's motion be denied as a matter of law. For the reasons discussed below, both aspects of Mr. Taylor's motion will be denied except as to the claim that petitioning creditor James S. Bush failed to adequately investigate the existence of the alleged debtor, Taylor and Associates, L.P. The court will set this aspect of the motion for an evidentiary hearing. This is a core

¹In his original motion filed April 24, 1998, Mr. Taylor requested an award against the "Petitioning Creditors" without specifying the creditors by name. Thus, it appeared that he sought recovery not only from the original sole petitioning creditor, James S. Bush, but also the additional twelve creditors who later joined in the petition. In his supplemental motion filed on November 29, 2000, Mr. Taylor similarly seeks recovery against the "Petitioning Creditors" but the only allegation of bad faith pertains to Mr. Bush. A response in opposition to Mr. Taylor's motion was filed by "Petitioners" James S. Bush, Johnson & Galyon, Inc., Jim Rogers, Sr., Michael Rogers, Ben F. Rogers, Robert E. Hall, Robert E. Hall, M.D., P.A. Money Purchase Pension Plan and Robert E. Hall, M.D., P.A. Defined Benefit Plan. It does not appear from the record that Mr. Taylor ever served the remaining petitioning creditors, William Gilley, Richard Gamble, Jr., Christine Gamble and W.T. Mathis, with either the original or supplemental motion.

proceeding. See 28 U.S.C. § 157(b)(A) and (O).

I.

Previous opinions by this court, the district court, and the Sixth Circuit Court of Appeals² "extensively and very thoroughly detail the facts in this case." *Bush v. Taylor (In re Taylor & Associates, L.P.)*, 249 B.R. 474, 476 (E.D. Tenn. 1998). As such, it is not necessary for the court to repeat those facts, although a brief recitation of the case's procedural history will be helpful. As set forth in one of the district court's decisions in this case:

Joseph C. Taylor lived and worked in Knoxville, Tennessee, as a securities broker and private businessman. Joseph Taylor functioned under several business names, including Joseph C. Taylor, Taylor & Associates, Inc., Taylor & Associates, Joseph C. Taylor & Associates, Inc., and Taylor & Associates, L.P. The evidence indicates Joseph Taylor operated a Ponzi scheme and when the scheme began to fall apart, Joseph Taylor committed suicide on November 3, 1995.

In an attempt to recover some of the monies invested with Joseph Taylor, on November 13, 1995, [petitioning creditor] James S. Bush commenced this Chapter 7 case with the filing of an involuntary

²See *Bush v. Taylor (In re Taylor & Associates, L.P.)*, 211 F.3d 1270, 2000 WL 554179 (6th Cir., April 24, 2000); *Bush v. Taylor (Taylor & Associates, L.P.)*, 249 B.R. 474 (E.D. Tenn. 1998); *Taylor v. Bush (In re Taylor & Associates, L.P.)*, 249 B.R. 431 (E.D. Tenn. 1997); *In re Taylor & Associates, L.P.*, 249 B.R. 448 (Bankr. E.D. Tenn. 1998); *In re Taylor & Associates, L.P.*, 193 B.R. 465 (Bankr. E.D. Tenn. 1996); *In re Taylor & Associates, L.P.*, 191 B.R. 374 (Bankr. E.D. Tenn. 1996).

petition against Taylor & Associates, L.P. The involuntary petition was subsequently joined by twelve creditors. On December 1, 1995, Dudley Taylor filed a motion to dismiss the involuntary petition alleging, inter alia, Taylor & Associates, L.P. was not an entity which qualified as a debtor under 11 U.S.C. § 109(b).

Id. Although Dudley W. Taylor and Joseph C. Taylor share the same surname, there is no indication that they were related. See *Taylor v. Bush (In re Taylor & Associates, L.P.)*, 249 B.R. 431, 436 n.9 (E.D. Tenn. 1997). Instead, Dudley W. Taylor had been an attorney for Joseph C. Taylor and had invested with him. *Id.* at 436-38. This court held that Dudley W. Taylor had standing to contest the involuntary petition because of allegations by Mr. Bush that Dudley W. Taylor was a general partner in Taylor & Associates, L.P. along with Joseph Taylor. *Id.* at 435 n.5.

The bankruptcy court denied the motion to dismiss, concluding that Taylor & Associates, L.P. was a limited partnership under Tennessee law and therefore eligible to be a debtor under chapter 7. *In re Taylor & Associates, L.P.*, 191 B.R. 374 (Bankr. E.D. Tenn. 1996). Thereafter, the bankruptcy court sustained the involuntary petition and entered an order for relief. *In re Taylor & Associates, L.P.*, 193 B.R. 465 (Bankr. E.D. Tenn. 1996).

Upon appeal to the district court by Dudley W. Taylor, the

court vacated the bankruptcy court's decisions and remanded the case, concluding that genuine issues of material fact existed as to whether Taylor & Associates, L.P. was a partnership and thus eligible for bankruptcy relief. *In re Taylor & Associates, L.P.*, 249 B.R. at 448. After conducting an evidentiary hearing, the bankruptcy court dismissed the involuntary petition, finding the evidence insufficient to establish that the alleged debtor was either a limited or general partnership. *In re Taylor & Associates, L.P.*, 249 B.R. 448, 473 (Bankr. E.D. Tenn. 1998). That decision was affirmed first by the district court, *In re Taylor & Associates, L.P.*, 249 B.R. at 481; and then ultimately by the Sixth Circuit Court of Appeals. 2000 WL 554179 (6th Cir., April 24, 2000).

During the year when the order for relief was in effect, the respective counsel for the petitioning creditors filed applications pursuant to 11 U.S.C. § 503(b)(4) for allowance of compensation and expenses incurred in connection with the filing and prosecution of the involuntary petition. No objections were raised to those applications and after a hearing, the court on September 23, 1996, entered orders granting the firm of Egerton, McAfee, Armistead and Davis, P.C. compensation and expenses totaling \$94,457.18 and the firm of McCord, Troutman & Irwin, P.C. compensation in the amount of \$5,318.75 and \$316.78 in

expenses. These amounts were paid as administrative expenses from interest earned on funds the chapter 7 trustee had collected in the course of administering the estate but later returned when this case was dismissed.

After the involuntary petition was dismissed on April 3, 1998, Dudley W. Taylor filed on April 24, 1998, a "MOTION SEEKING DISGORGEMENT OF COMPENSATION AND EXPENSES DISBURSED TO ATTORNEYS FOR PETITIONING CREDITORS AND SEEKING AN AWARD OF ATTORNEY'S FEES INCURRED BY DUDLEY W. TAYLOR." As a basis for relief, Mr. Taylor stated the following in paragraphs 4 and 5 of his motion:

As a result of this Court's April 3, 1998 Order dismissing this case, the compensation and expenses allowed the Egerton Firm and the McCord Firm should be disgorged pursuant to 11 U.S.C. §§ 105, 349 and 503.

Moreover, pursuant to 11 U.S.C. 303(i), this Court should grant an award against the Petitioning Creditors and in favor of D. Taylor for costs and reasonable attorney's fees incurred by D. Taylor.

Because the decision vacating the order for relief and dismissing this case was on appeal, this court entered an order on May 28, 1998, deferring consideration of Mr. Taylor's motion pending resolution of the appeal. Thereafter, on August 11, 2000, after the appeals had run their course, a status conference was held regarding Dudley W. Taylor's motion. As a result of that status conference, the court entered on August

18, 2000, a scheduling order directing Mr. Taylor to "file an amendment to his pending motion specifying the precise relief being sought under 11 U.S.C. § 303(i) and any additional motions on or before August 25, 2000." Because the petitioning creditors had indicated at the status conference that they intended to request that Dudley W. Taylor's motion be denied on legal grounds, the August 18, 2000 order also directed that any such request and a brief in support thereof be filed by October 13, 2000 with Mr. Taylor to file a brief in response by November 3, 2000. The order cautioned that "[f]ailure to respond within the time allowed may be deemed an admission that the request is well taken and should be granted."

Notwithstanding the directives in the August 18, 2000 order, Dudley W. Taylor filed no amendment to his motion of April 24, 1998 nor did he file a response when the petitioning creditors requested on September 25, 2000, that his motion be denied as a matter of law. After Mr. Taylor's time to respond had expired, this court issued on November 27, 2000, a memorandum opinion and order wherein it denied Mr. Taylor's motion, concluding that the three Code sections which he cited, 11 U.S.C. §§ 105, 349 and 503, "provide[d] no basis for Mr. Taylor's assertion that the law firms should be required to disgorge their fees simply because the involuntary petition filed by them on behalf of

their clients was dismissed." The court also concluded that Mr. Taylor was not entitled to an award of his costs and attorney fees under 11 U.S.C. § 303(i)(1) because he was not the debtor and § 303(i)(1) by its plain language is limited to a recovery "in favor of the debtor."

On November 29, 2000, Dudley W. Taylor filed a motion requesting that the court reconsider and alter or amend its November 27, 2000 ruling. The motion was accompanied by Mr. Taylor's affidavit wherein he discussed the failure to amend and supplement his April 28, 1998 motion by the August 25, 2000 deadline. Mr. Taylor explained that a "Supplemental Motion" had been prepared by bankruptcy counsel on his behalf prior to the deadline and that he and counsel transmitted via facsimile a draft of the motion back and forth with comments. Mr. Taylor stated that upon receiving the original from counsel on August 24, 2000, he signed the supplemental motion and gave it to an unnamed paralegal for filing along with an affidavit setting forth the time and expenses incurred by him in this proceeding. Although the affidavit was filed on August 25, 2000, the supplemental motion was not. Mr. Taylor stated that upon receiving the court's opinion, he was "stunned to read that the Motion Supplement had not be filed." Mr. Taylor also stated that after an investigation, he "located the original of the

Motion Supplement in an office at my firm maintained by the paralegal." Mr. Taylor advised that he followed his "usual office procedure" with respect to these documents, that it was his "intention to file the Motion Supplement at the same time the affidavit was filed" and that he had "no explanation as to why only the affidavit was filed."

Mr. Taylor attached the original of the supplemental motion to his motion to reconsider and alter or amend. He requested that the court grant permission to file the original and that the court reconsider its November 27 memorandum and order, "taking into account the Motion Supplement here tendered." Notably, neither the motion nor the affidavit addressed Mr. Taylor's failure to respond to the petitioning creditors' request and brief in support thereof that Mr. Taylor's motion be denied as a matter of law which he was served with on September 25, 2000. Nor did either address why Mr. Taylor did not file the supplemental motion when its absence was noted by petitioning creditors in their brief and asserted as a basis for dismissal of Mr. Taylor's motion as a matter of law.

A hearing on Dudley W. Taylor's motion to reconsider and alter or amend was conducted on December 15, 2000. At that hearing, the court held that it would refuse to reconsider or amend its ruling on the issues addressed in its November 27,

2000 memorandum. Nonetheless, the court did permit Mr. Taylor to file the supplemental motion for the court's consideration of the new issues raised therein, i.e., whether Mr. Taylor was entitled to an award of damages under 11 U.S.C. § 303(i)(2) and his request that all administrative expenses be taxed to the petitioning creditors. In accordance with these rulings, this court entered an order on December 22, 2000, directing Mr. Taylor to file his supplemental motion with supporting memorandum of law by January 15, 2001, and setting a time period for the petitioning creditors to respond.³

In his supplemental motion at paragraphs 13 and 14, Dudley W. Taylor asserts the following with respect to the issues pending before the court:

D. Taylor seeks recovery of attorney's fees against the Petitioning Creditors pursuant to 11 U.S.C. § 303(i)(2) which permits an award of damages against any petitioner that filed the petition in bad faith.... James Bush ("Bush") initially filed the Involuntary Petition as the sole petitioning creditor, without any inquiry as to the existence of other

³Despite the fact that Mr. Taylor requested in his motion to reconsider and alter or amend filed on November 19, 2000, that he be granted permission to file the supplemental motion, Mr. Taylor actually filed the supplemental motion when he filed the motion to reconsider since the original of the supplemental motion was attached to the motion to reconsider and both were file-stamped at that time by the clerk. Apparently in light of this previous filing, Mr. Taylor did not file a new supplemental motion by the January 15, 2001 deadline set by the court although he did file a memorandum of law on January 16, 2001, one day after the deadline.

similarly situated individuals, or entities. In addition, upon learning of the filing of the Involuntary Petition, D. Taylor contacted attorneys for Bush in order to disclose to them the fact that no partnership known as TALP ever existed. D. Taylor offered to allow the attorneys for Bush to review the contents of his file whereby he attempted to establish TALP, for the limited purpose of allowing Joseph C. Taylor and John Buchheit to make an investment in an entity known as Valley Medical Systems, L.P.... In spite of this information, which ultimately was found to be accurate, Bush proceeded with the bankruptcy proceeding without making any independent investigation as to the truth or accuracy of the information provided to his attorneys by D. Taylor. Such action by Bush constitutes bad faith as contemplated under § 303(i)(2).

D. Taylor also seeks to tax all administrative expenses against the Petitioning Creditors pursuant to 11 U.S.C. § 303(i)(1) or, in the alternative, pursuant to § 303(i)(2), for the same reasons as discussed above.

In his memorandum of law in support of his motion, Dudley

W. Taylor elaborates that:

In his deposition taken on January 4, 1996, Bush testified under oath that he made no inquiry, or diligent search, to determine if other similarly situated individuals, or entities, existed that could join in the Involuntary Petition. When questioned at his deposition as to what steps he took to try to determine the existence of other similarly situated individuals, or entities, Bush responded that he "didn't call anybody, or didn't talk to anyone else personally." Bush further admitted that he never attempted to contact "anyone else."

Dudley W. Taylor also notes that a corporation in which Mr. Bush was the majority shareholder, Johnson & Galyon, Inc., was also owed monies by TALP, but that Johnson & Galyon, Inc. did

not join in the involuntary petition. Mr. Taylor alleges that these facts establish that the petitioning creditors acted in bad faith, although he requests an evidentiary hearing such that the court can "determine the nature of Bush's bad faith conduct." Dudley W. Taylor requests that upon such a determination, "this Court should exercise its discretion and tax D. Taylor's attorney fees to Bush, and also tax against Bush, and other Petitioning Creditors as deemed necessary, all administrative expenses pursuant to 11 U.S.C. § 303(i)(2)."

In their response filed on February 15, 2001, the petitioning creditors assert that 11 U.S.C. § 303(i)(2) provides no basis for Dudley W. Taylor's request that all administrative expenses be taxed against them. They note that this Code section "only provides for an award of 'damages' which language connotes that the party seeking the award has been damaged." The petitioning creditors observe that because Dudley W. Taylor is not the debtor, "the payment of administrative expenses in this case was not a damage incurred by D. Taylor, and he has presented no evidence in order to prove that he incurred such damages."

The petitioning creditors also contend that Dudley W. Taylor's motion to tax all administrative expenses is untimely, in that it was filed more than three years after the order for

relief was vacated and more than nine months after the Sixth Circuit's decision. The petitioning creditors maintain that the orders awarding the administrative expenses are final and entitled to collateral estoppel and res judicata effect because no objection was made to their payment and no appeal was taken as to the orders.

With respect to Dudley W. Taylor's assertion that he is entitled to damages because of the alleged bad faith filing, the petitioning creditors argue that "[t]he fact that this Court originally entered an Order for Relief pursuant to the Involuntary Petition should be sufficient to insulate Petitioners from any claim of bad faith." As such, they maintain that any bad faith claim should be summarily denied. Additionally, the petitioning creditors maintain that the law of the case precludes Dudley W. Taylor from recovery under § 303(i)(2) in that this court's order denying the motion to dismiss expressly rejected Mr. Taylor's claim that the involuntary petition was filed in bad faith and that these findings have never been expressly overruled.

Lastly, the petitioning creditors assert that in light of the presumption of good faith which accompanies the filing of an involuntary petition, Dudley W. Taylor has failed to present or even allege facts sufficient to overcome this presumption. They

note that Mr. Taylor's allegations regarding Mr. Bush's inquiry as to other similarly situated creditors and as to whether Taylor & Associates, L.P. was in fact a partnership are not supported by affidavit or other evidentiary material. Furthermore, they assert that although Mr. Bush personally did not inquire about other creditors, his attorneys conducted such an inquiry, as set forth in the affidavits of Herbert H. Slatery, Esq. and Stephen A. McSween, Esq., and that this inquiry revealed only creditors who were not eligible to be petitioning creditors, either because they were insiders or transferees of voidable transfers. The petitioning creditors deny that the bankruptcy filing was the result of an improper purpose—debt collection on the part of Mr. Bush—but was instead prompted by the desire to avoid the dissipation of assets and toll the applicable preference period. With respect to Dudley W. Taylor's allegation regarding his contact with Mr. Bush's attorneys to advise them that no partnership existed, the petitioning creditors observe that Mr. Taylor "neglect[ed] to mention that he did not disclose to them at that time many of the documents that were prepared by D. Taylor or his law firm and that were admitted into evidence and relied upon by this Court in granting the Order for Relief." Based upon the foregoing, the petitioning creditors request that Dudley W.

Taylor's motion be summarily denied.

On February 23, 2001, Dudley W. Taylor filed a reply memorandum to the petitioning creditors' response. With respect to the petitioning creditors' assertion that his allegation of bad faith is unsupported by any affidavits, Mr. Taylor asserts that the court only directed the filing of briefs in order to determine if an evidentiary hearing was necessary and that there was no discussion at the December 15 hearing that evidence should be attached to the briefs. "However, to satisfy the Petitioning Creditors' unfounded demand that evidence, or sworn testimony, be presented to the Court," Mr. Taylor attached to his reply memorandum an unauthenticated copy of the transcript from Mr. Bush's January 14, 1996 deposition, wherein Mr. Bush was questioned regarding his efforts to discover other similarly situated creditors.

II.

As noted, Dudley W. Taylor's motion sets forth two requested grounds for relief: (1) that all administrative expenses be taxed against the petitioning creditors; and (2) that the petitioning creditors be required to pay his damages which consists of his attorney fees in this bankruptcy case. The asserted statutory basis for both of these claims is 11 U.S.C.

§ 303(i)(2) which provides as follows:

If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment—

- ...
- (2) against any petitioner that filed the petition in bad faith, for—
 - (A) any damages proximately caused by such filing;
 - or
 - (B) punitive damages.

Simply stated, § 303(i)(2) permits a court to grant a judgment against a petitioning creditor who files an involuntary petition in bad faith for damages proximately caused by the filing. *Sjostedt v. Salmon (Matter of Salmon)*, 128 B.R. 313, 316 (Bankr. M.D. Fla. 1991).

Dudley W. Taylor asserts that the administrative expenses incurred in this case were "damages proximately caused by [the petitioning creditors' bad faith] filing." In response, the petitioning creditors note that because Mr. Taylor is not the debtor and because there has been no allegation that payment of administrative expenses were damages incurred by him, Mr. Taylor has no standing to make this claim. In his reply memorandum, Mr. Taylor does not specifically respond to this argument other than to assert that the bad faith filing is the basis for taxing administrative expenses against the petitioning creditors.

The petitioning creditors are correct in this regard. It

is axiomatic that one who seeks to recover damages must be the one who has suffered the injury. Mr. Taylor has not cited and the court has not located a single case wherein damages were awarded under 11 U.S.C. § 303(i) to someone other than the injured party. Nor can the court conceive of any other basis whereby § 303(i) (or any other Code provision for that matter) can be utilized to grant Dudley W. Taylor a judgment against the petitioning creditors for the administrative expenses paid in this case. To the extent the administrative expenses can be characterized as damages, they were not damages suffered by Dudley W. Taylor. Accordingly, Mr. Taylor is without standing to assert such a claim. His request to tax the petitioning creditors with all administrative expenses must be denied. In light of this conclusion, it is unnecessary for this court to determine whether Mr. Taylor's motion to tax all administrative expenses against petitioning creditors is also untimely as the petitioning creditors contend.

The second aspect of Dudley W. Taylor's motion pertains to the attorney fees which he incurred in opposing the involuntary petition. Mr. Taylor's assertion of bad faith is premised on two factual allegations: (1) that Mr. Bush failed to conduct an appropriate pre-filing inquiry to ascertain other similarly situated creditors; and (2) that Mr. Bush failed to adequately

investigate whether Taylor & Associates, L.P. actually existed despite being placed on notice that it did not by Mr. Taylor. Before examining these allegations it must be noted that "dismissal alone [of an involuntary petition] does not per se establish ... bad faith on the part of the Creditors." *In re Mundo Custom Homes, Inc.*, 179 B.R. 566, 571 (Bankr. N.D. Ill. 1995). To the contrary, a presumption of good faith in favor of the petitioning creditor exists and the movant has the burden of proving bad faith. *In re Race Horses, Inc.*, 207 B.R. 229, 232 (Bankr. E.D. Okla. 1997). Furthermore, "[i]n order to recover damages against the petitioning creditor, there must be a 'reasonably close causal connection between the conduct and the resulting injury.'" *Id.* (quoting *In re Kearney*, 121 B.R. 642, 644 (Bankr. M.D. Fla. 1990)). And lastly, even if damages proximately caused by a bad faith filing are established, 11 U.S.C. § 303(i) makes it clear by the use of the word "may" that any award is discretionary with the court. *In re Advance Press & Litho, Inc.*, 46 B.R. 700, 705 (Bankr. D. Colo 1984).

With respect to the allegation that Mr. Bush failed to ascertain other similarly situated creditors, it must be noted that the petition in this case was not dismissed because an insufficient number of creditors filed the involuntary petition. Instead, the petition was dismissed for lack of jurisdiction

because the petitioning creditors failed to establish that Taylor & Associates, L.P. was eligible to be a debtor. See *In re Taylor & Associates, L.P.*, 249 B.R. at 473. Thus, regardless of whether the involuntary petition was filed by Mr. Bush alone or by all twelve creditors who subsequently joined in the petition, Mr. Taylor would still have incurred the fees allegedly expended by him in opposing the involuntary filing. As such, it can not be said that there was a "causal connection between the conduct and the resulting injury." The fact that Mr. Bush's alleged failure to conduct an appropriate inquiry as to the correct number of creditors was not the proximate cause of Mr. Taylor's alleged damages distinguishes this case from those wherein the lack of the requisite number of creditors served as the basis for dismissal of an involuntary petition and consequently a finding of bad faith. See *In re Dino's Inc.*, 183 B.R. 779 (S.D. Ohio 1995); *In re Atlas Machine and Iron Works, Inc.*, 190 B.R. 796 (Bankr. E.D. Va. 1995); *In re K.P. Enter.*, 135 B.R. 174 (Bankr. D. Me. 1992); *In re Kearney*, 121 B.R. 642 (Bankr. M.D. Fla. 1990). In conclusion, because the alleged damages suffered by Dudley W. Taylor were not proximately caused by an alleged failure by Mr. Bush to ascertain if other similarly situated creditors existed, Mr. Taylor's allegations in this regard are insufficient to state a claim under 11 U.S.C.

§ 303(i)(2).

The second allegation which forms the basis for Dudley W. Taylor's bad faith argument is that Mr. Bush failed to adequately investigate whether Taylor & Associates, L.P. actually existed after having been provided information that it did not by Mr. Taylor. It has been held that the failure to make a reasonable inquiry into relevant facts and law before commencing an involuntary filing constitutes bad faith, with the courts analogizing the "bad faith" inquiry under § 303(i) with the requirements of Fed. R. Bankr. P. 9011. See *In re Race Horses, Inc.*, 207 B.R. at 233; *In re Turner*, 80 B.R. 618, 623 (Bankr. D. Mass. 1987); *In re K.P. Enter.*, 135 B.R. at 179-80. Other courts have utilized a subjective test, focusing on whether the petitioning creditor's motivation in filing the involuntary was proper ("improper purpose test"), while some courts have adopted an objective standard, assessing what a reasonable person in the creditor's position would have done and whether the involuntary petition was improperly used to gain an advantage over other creditors ("improper use test"). A few courts have considered both subjective and objective criteria. See 2 COLLIER ON BANKRUPTCY ¶ 303.06[1] (15th ed. rev. 2001) and cases cited therein.

Neither the United States Supreme Court nor the Sixth

Circuit Court of Appeals has defined "bad faith" in the context of an involuntary filing under 11 U.S.C. § 303(i)(2), although the Sixth Circuit has on several occasions considered "good faith" requirements under other Bankruptcy Code provisions. In these discussions, the Sixth Circuit does not distinguish between lack of good faith and bad faith, often using the two phrases interchangeably. In the context of whether a chapter 11 petition was filed in good faith, the Sixth Circuit has stated that "good faith is an amorphous notion, largely defined by factual inquiry," that "no single fact is dispositive" and that good faith is "a discretionary determination that turns on the bankruptcy court's evaluation of a multitude of factors." *Laguna Assoc. Ltd. Partnership v. Aeta Casualty & Surety Co.* (*In re Laguna Assoc. Ltd. Partnership*), 30 F.3d 734 (6th Cir. 1994)(quoting in part *In re Okoreeh-Baah*, 836 F.2d 1030, 1033 (6th Cir. 1988)).

Similarly, regarding the issue of whether a chapter 13 plan was filed in good faith as required by 11 U.S.C. § 1325(a)(3), the Sixth Circuit has observed that "[o]ur Circuit's good faith test requires consideration of the totality of circumstances." *Society Nat'l Bank v. Barrett* (*In re Barrett*), 964 F.2d 588, 591 (6th Cir. 1992). With respect to whether a chapter 7 voluntary case was filed in good faith, the Sixth Circuit has noted that

it finds particular merit in what has been described as the "smell test," although observing that the factors relied upon by the bankruptcy court should be delineated to enable appellate review. *Industrial Ins. Services, Inc. v. Zick (In re Zick)*, 931 F.2d 1124, 1127 (6th Cir. 1991)(citing *Morgan Fiduciary, Ltd. v. Citizens and Southern Int'l Bank*, 95 B.R. 232, 234 (S.D. Fla. 1988)).⁴ And, in *255 Park Plaza Assoc. Ltd. Partnership*, the Sixth Circuit considered the issue of what constitutes good faith under 11 U.S.C. § 1126(e), which permits the court to disallow the vote of any creditor who acts in bad faith in

⁴With respect to Bankruptcy Judge Cristol's comment in *Morgan Fiduciary* that the petition failed to pass the "smell test," the district court on appeal stated the following:

The late Irwin Younger, possibly the best lecturer—and, certainly the most enjoyable—on principles of law to judges and lawyers, observed that the most important item in the courtroom and all too seldom used is the judge's nose. Any trial judge will inevitably come to the conclusion on occasion that a certain case or claim or defense has a bad odor. Simply put, a matter smells. Some smell so bad they stink

Judge Cristol's observation that Morgan's bankruptcy petition "fails to pass the 'smell test'" is hardly the arbitrary, unsupportable conclusion appellant asserts. The bankruptcy judge's conclusion is far from being merely a subjective olfactory whim; it is based on numerous objective factors, many of which were stated previously in this Order.

This Court finds Judge Cristol's perception, and candor in expressing it, is a sound exercise in judicial decision-making.

Morgan Fiduciary, 95 B.R. at 234.

either voting or soliciting votes for or against a plan. 255
Park Plaza Assoc. Ltd. Partnership v. Connecticut Gen. Life Ins.
Co. (In re 255 Park Plaza Associates Ltd. Partnership), 100 F.3d
1214, 1219 (6th Cir. 1996). Again, the court stated that
"whether bad faith exists can only be decided after an analysis
of the facts of each case." *Id.* The court considered pertinent
whether the creditor had acted to obtain an unfair advantage
over creditors, although observing that "the Bankruptcy Code
does not require 'selfless disinterest.'" *Id.*

From this recitation, the court can only conclude that the
Sixth Circuit Court of Appeals would apply this same totality of
the circumstances test to a determination of whether an
involuntary petition has been filed in bad faith for purposes of
11 U.S.C. § 303(i)(2). Granted, many factors considered by
other courts in the application of other bad faith tests would
be pertinent to this court's inquiry, i.e., the creditor's
motive in filing the involuntary petition, what a reasonable
person in these circumstances would have done, and whether a
reasonable inquiry into the relevant facts and pertinent law was
conducted prior to the involuntary filing. However, as the
Sixth Circuit has cautioned, "no single fact is dispositive."⁵

⁵The court notes that Mr. Taylor asserts in his memorandum
(continued...)

Instead, it will be necessary for the court to consider all of the relevant facts before making a determination as to whether the involuntary petition "fails to pass the smell test."

As noted, the petitioning creditors assert that a bad faith inquiry has already been conducted by this court, that the court concluded that "[t]here is no evidence that the Involuntary Petition was filed in bad faith," and that "[a]lthough the subsequent Order for Relief was vacated, Judge Stair's findings in regard to D. Taylor's bad faith claim have never been expressly overruled." The petitioning creditors are correct that this court previously denied Dudley W. Taylor's motion to

⁵(...continued)
of law that Mr. Bush used the Bankruptcy Code as a debt collection mechanism and that this constitutes an improper use of an involuntary petition. While it has been noted that debt collection is an improper purpose for filing an involuntary petition, see, e.g., *In re Dino's Inc.*, 183 B.R. at 783; it cannot be said in the abstract, without consideration of all the other facts in the case, that a petitioning creditor motivated by the desire to see its debts paid has acted in bad faith. As the Sixth Circuit has noted, "the Bankruptcy Code does not require 'selfless disinterest.'" See *In re 255 Park Plaza Assoc. Ltd. Partnership*, 100 F.3d at 1219. Rather, the court must consider whether the facts justify the particular remedy of involuntary bankruptcy. See *Camelot, Inc. v. Hayden*, 30 B.R. 409, 411 (E.D. Tenn. 1983)(creditor may not "use an impermissible means to achieve an otherwise legitimate goal"); *In re Better Care, Ltd.*, 97 B.R. 405, 411 (Bankr. N.D. Ill. 1989)("An improper use of the Bankruptcy Code justifying a finding of bad faith will ... exist any time a creditor uses an involuntary bankruptcy to obtain a disproportionate advantage to that particular creditor's position, rather than to protect against other creditors obtaining such a disproportionate advantage.").

dismiss which was premised on a bad faith filing. However, this ruling, like that regarding whether Taylor and Associates, L.P. was an eligible debtor, was made summarily in the same fashion as the ruling on eligibility without a full opportunity for an evidentiary hearing. Mr. Taylor appealed this court's bad faith determination, along with the other rulings including eligibility. Upon appeal, because the eligibility issue was at the heart of the court's subject matter jurisdiction and thus potentially dispositive of the entire appeal, the district court only addressed this one issue, concluding that this court erred in deciding this issue summarily since genuine issues of material fact existed. While the district court did not expressly overturn this court's findings of fact, this result was inherent in the district court's vacation of the order for relief and remand for the purposes of an evidentiary hearing.

As such, this court is unable to grant the petitioning creditors' request that Mr. Taylor's bad faith claim be summarily denied. In this regard, it must be noted that Dudley W. Taylor's allegation of bad faith pertains only to the original petitioning creditor, James S. Bush. No allegations of bad faith have been made with respect to the other creditors who subsequently joined in the petition. "An alleged debtor must prove separately bad faith by each petitioning creditor against

whom it seeks an award of damages under § 303(i)(2)." *In re Reveley*, 148 B.R. 398, 406 (Bankr. S.D.N.Y. 1992) (citing 2 COLLIER ON BANKRUPTCY ¶ 303.39, 303.139 (15th ed. 1992)). See also *In re Advance Press & Litho, Inc.*, 46 B.R. at 705. Absent specific allegations of bad faith against each petitioning creditor, Dudley W. Taylor's motion under § 303(i)(2) must be denied with respect to all petitioning creditors except Mr. Bush.

An order will be entered in accordance with this memorandum opinion denying the Dudley W. Taylor's motion as supplemented in all respects except with respect to the alleged bad faith filing by James S. Bush.

FILED: May 14, 2001

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE